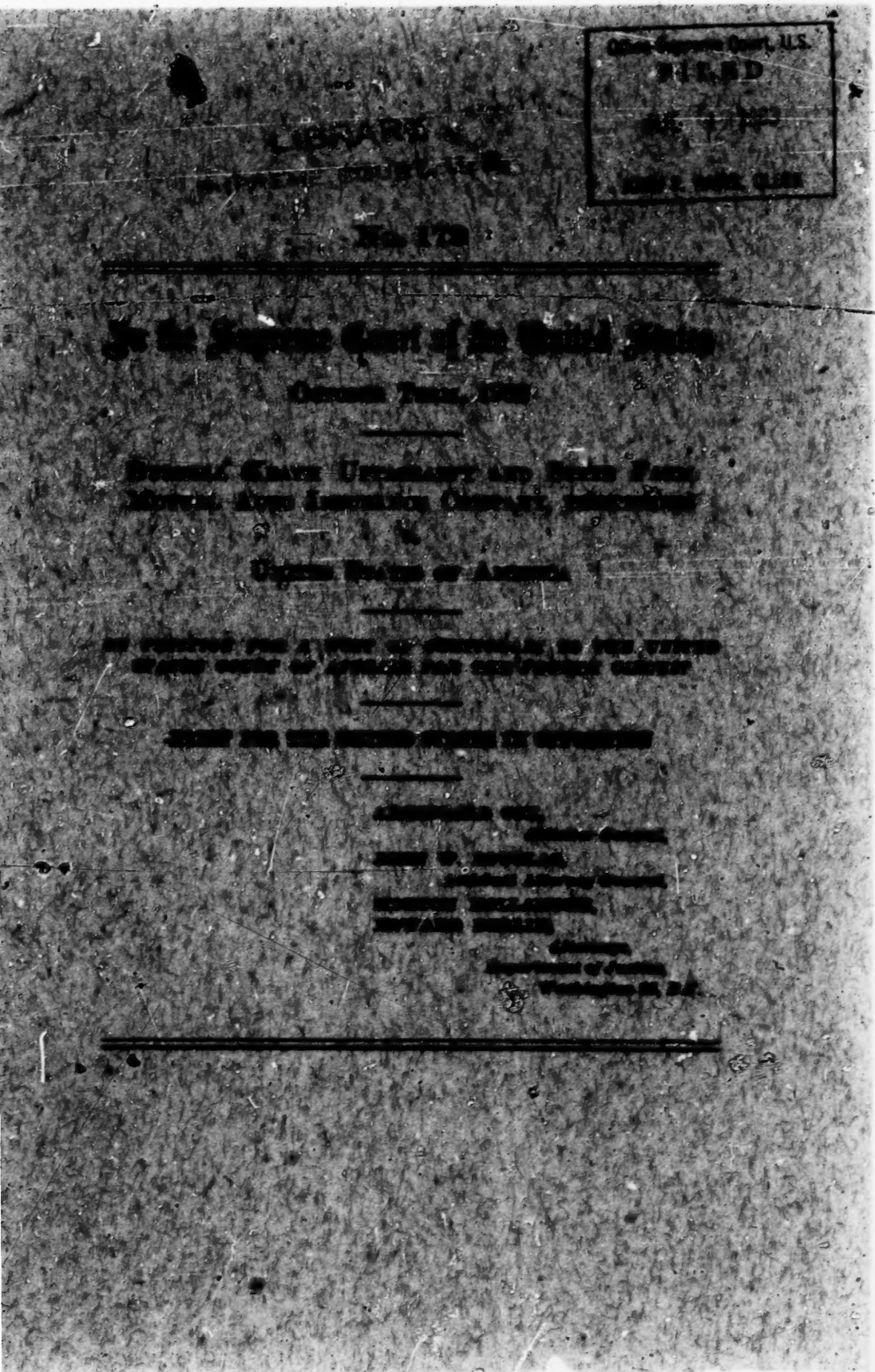

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 179

BURNELL KEATH UPTAGRAFFT AND STATE FARM MUTUAL AUTO INSURANCE COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit (R. 29-36)[1] is reported at 315 F. 2d 200. The opinion of the district court (R. 11-20) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1963. The petition for a writ of certiorari was filed on June 1, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." references are to the pages of the Transcript of Record filed with this Court. "Pet." references are to the pages of the Petition.

QUESTION PRESENTED

Whether the United States has an obligation under the Federal Tort Claims Act, 28 U.S.C. 1346(b), *et seq.*, to indemnify a federal employee, or his insurer, for liability resulting from the employee's allegedly negligent driving while in the scope of his employment.

STATUTE INVOLVED

The pertinent provisions of the Federal Tort Claims Act, 28 U.S.C. 1346(b), *et seq.*, are set forth in the Appendix, *infra*, pp. 9–11.

STATEMENT

The material facts, stipulated by the parties in the district court, may be summarized as follows:[2]

On September 11, 1959, petitioner Burnell Keath Uptagrafft—a criminal investigator assigned to the Alcohol and Tobacco Tax Unit of the Internal Revenue Service, United States Treasury Department—and two other investigators set out for the purpose of locating an illegal still (Pet. 6, 7). The three agents were dressed in work clothes and were riding in an unmarked government automobile, with Uptagrafft at the wheel (*ibid.*).

In the course of their investigation, the agents observed a vehicle, operated by James Woodrow Edwards, departing from a local junk yard which was considered a "nip joint" (Pet. 7). One of the agents thought the driver of the vehicle to be a known whisky violator and when the vehicle sped away the agents

[2] The full stipulation of facts is reproduced in the petition, pp. 5–12.

followed it in pursuit (Pet. 8). In the course of the chase, Edwards' car ran off the road, causing him to sustain personal injuries (*ibid.*). Subsequent investigation revealed that Edwards was innocent of wrongdoing and that the agents' suspicions had been unfounded (Pet. 10).

On October 14, 1959, Edwards instituted suit against Uptagrafft in the appropriate Virginia court, alleging that his injuries had been occasioned by the latter's reckless operation of the government automobile. As Uptagrafft's personal liability insurance included "drive-other-car" coverage, his insurer, petitioner State Farm Mutual Auto Insurance Company, undertook his defense[3] and removed the suit from the state court to the United States District Court for the Eastern District of Virginia pursuant to 28 U.S.C. 1442 (R. 11, 12).

Uptagrafft then obtained an order from the district court impleading the United States as a third-party defendant pursuant to 14(a) of the Federal Rules of Civil Procedure. The third party complaint asserted that, as Uptagrafft had been acting within the scope of his employment at the time of the accident, he had a "right to exoneration and/or indemnity * * * against the United States * * * based and founded on the

[3] The United States declined to assume defense of the suit. This was in keeping with the basic policy of the Justice Department against affording representation where the government employee sued was adequately protected by personal insurance. See Hearings before the House Committee on the Judiciary, 86th Cong., 1st Sess., *Government Driver Liability*, Vol. 2, Ser. 8, pp. 11–12. Of course, even where the employee was accorded legal assistance by the United States, he was not relieved from personal liability for any ensuing judgment.

contract, express and/or implied, whereunder the said Burnell Keath Uptagrafft was employed by the United States as a Criminal Investigator in the Alcohol and Tobacco Tax Unit, U.S. Treasury Department, * * *" (R. 4, 5).

Subsequently, State Farm, acting for Uptagrafft, settled Edwards' claim. The district court—with the knowledge but without the acquiescence of the United States—entered an order dismissing the suit as between Edwards and Uptagrafft (R. 12). Thereafter, the insurance company joined Uptagrafft in the suit as a third-party plaintiff and the two filed an amended complaint seeking indemnity from the United States for the full amount ($17,115.96) the insurer had expended (R. 7–9). The government moved to dismiss the third-party action on the ground that no right of indemnity or exoneration existed as against the United States and that Rule 14(a) of the Federal Rules of Civil Procedure did not permit joinder of the government as a third-party defendant here because, whatever the government's liability to Edwards in an independent suit might have been, it had no liability to the third-party plaintiffs (R. 10).

Treating the government's motion as one for summary judgment, the district court ruled that there was no theory upon which the third-party plaintiffs could successfully urge indemnity or exoneration and dismissed the third-party complaint (R. 11–20). The court noted that Uptagrafft was primarily liable for his tortious conduct, and that the United States, by the Tort Claims Act, was subjected to liability only under the doctrine of *respondeat superior*

as applied by state law. Referring specifically to the applicable Virginia law, the court concluded that "[t]he principle of exoneration does not operate in favor of one primarily liable against one secondarily liable." It also held that "we find no case in which the negligent employee has been permitted to recover from his employer under any theory of indemnity or exoneration in the absence of any express contract providing for such indemnification" (R. 16). On appeal the court below, agreeing with the conclusions reached by the district court, affirmed *per curiam* (R. 29–36).

ARGUMENT

This case plainly does not merit plenary consideration by the Court. There is no conflict of decisions and the result reached below is clearly correct. Finally, the issue lacks future significance.

1. We recognize that there are certain situations in which the jurisdiction of the courts under the Federal Tort Claims Act may be invoked to subject the United States to liability on a theory of indemnity, contribution or subrogation. *United States* v. *Aetna Surety Co.*, 338 U.S. 366; *United States* v. *Yellow Cab Co.*, 340 U.S. 543. Those cases, however, are of no avail to these petitioners. In *Aetna* and *Yellow Cab*, jurisdiction to sue the United States was predicated upon the fact that the claims were of a kind cognizable, under long-settled precedents, against private persons. Petitioners, we submit, can point to no similar precedent to justify the inclusion of their claim within the ambit of the Tort Claims Act.

Indeed, as the court below noted, under traditional *respondeat superior* principles, the servant whose negligence causes the injury is primarily liable, while the master is merely a technical wrongdoer whose liability is purely vicarious or derivative. The two are not joint tortfeasors. It is the rule, therefore, that whereas the common law imposes an obligation on the primary wrongdoer to indemnify the person secondarily liable, there is no liability on the part of the latter to indemnify the former. Compare *Terminal R. Ass'n of St. Louis* v. *United States*, 182 F. 2d 149, 151 (C.A. 8) and *St. Louis-San Francisco Ry. Co.* v. *United States*, 187 F. 2d 925, 927 (C.A. 5) with *American Automobile Ins. Co.* v. *Penn Mutual Ind. Co.*, 161 F. 2d 62, 63 (C.A. 3). This is in all events the law of Virginia. *Sykes* v. *Stone & Webster Eng. Corp.*, 186 Va. 116, 41 S.E. 2d 469. Since, under Virginia law, a private person could not be subjected to the indemnity or exoneration claim here asserted by petitioners, such liability may not be imposed on the United States under the Tort Claims Act. *Williams* v. *United States*, 350 U.S. 857.

2. Petitioners, in order to avoid the impact of these settled principles, argue that *United States* v. *Gilman*, 347 U.S. 507, supports their position. But that case was not concerned with the creation of a novel cause of action under the Tort Claims Act, but with the application, or rejection, of a traditional common law rule. There, the Court refused to allow the United States to proceed against one of its employees for indemnity where, by virtue of the *respondeat superior* doctrine, it had been vicariously held liable for the

employee's negligence. Conversely—and applying the proposition urged by petitioners that the Tort Claims Act should be effectuated so as to operate both ways (Pet. 16)—a rule of indemnity should not be created against the United States, especially where its effect would be to exonerate a primary tortfeasor and cast full responsibility on a technical wrongdoer.

In refusing, in Gilman, to afford the government the benefit of the established common law rule the Court pointed out (347 U.S. at 509) that "[t]he relations between the United States and its employees have presented a myriad of problems with which the Congress over the years has dealt", and concluded that the function of defining the liability of federal employees for indemnity (347 U.S. at 513), "is more appropriately for those who write the laws, rather than for those who interpret them." In the instant case it is even clearer, as the court below noted, that the problem is more appropriately addressed to Congress than to the courts.

Moreover, Congress has in fact recently addressed itself to the problem. On September 21, 1961, Congress passed Public Law 87-258, 75 Stat. 539, amending Section 2679 of the Federal Tort Claims Act. The amendment, which operates only prospectively, provides for the assumption by the United States of exclusive liability for claims against federal employees arising out of their operation of motor vehicles within the scope of their employment.* The enactment, as peti-

*In enacting Public Law 87-258 Congress provided that "[t]he amendments made by this Act shall be deemed to be in effect six months after the enactment hereof but any rights or

tioners concede (Pet. 22), means that the issue here presented lacks significance for the future. It also supports the conclusion that the Tort Claims Act, as originally written, did not embrace the relief sought by petitioners. Thus, the legislative history of the amendment indicates quite clearly that Congress was of the view that it was, for the first time, providing federal employees with some protection from liability arising from their on-duty operation of motor vehicles. See H. Rer No. 297, 87th Cong., 1st Sess.; S. Rep. No. 736, 87th Cong., 1st Sess.; Hearings before the House Committee on the Judiciary, 86th Cong., 1st Sess., *Government Driver Liability*, Vol. 2, Ser. 8.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1963.

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liabilities then existing shall not be affected." Accordingly, petitioners—as they acknowledge (Pet. 22)—are not here aided by that amendment for the operative events in the case at bar occurred well before the effective date of the legislation, March 21, 1962.

APPENDIX

The pertinent provisions of the Federal Tort Claims Act, 28 U.S.C. 1346(b), *et seq.*, provide:

SEC. 1346. *United States as defendant.*

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

SEC. 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

SEC. 2676. *Judgment as bar.*

The judgment in an action under section 1346(b) of this title shall constitute a com-

plete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim.

28 U.S.C. (Supp. IV) 2679, as amended by Public Law 87-258, 75 Stat. 539, provides:

SEC. 2679. *Exclusiveness of remedy.*

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b) The remedy by suit against the United States as provided by section 1346(b) of this title for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United

States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

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